

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ROY RATHKA, JR.,

Plaintiff-Appellant,

V

CITY OF TROY,

Defendant-Appellee.

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UNPUBLISHED

January 17, 2006

No. 256482

Oakland Circuit Court

LC No. 2003-050647-CH

Before: Donofrio, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's opinion and order granting summary disposition to defendant City of Troy (the city), under MCR 2.116(C)(10). We affirm.

Plaintiff owns lots 18 through 22 in the Pleasant View Subdivision in the city of Troy. The property is zoned R-2, two-family residential. In 1993, plaintiff was allowed to split lot 20 and consolidate the northern half of lot 20 with lots 18 and 19, and consolidate the southern half of lot 20 with lots 21 and 22, resulting in two larger parcels, a northern parcel and a southern parcel. Plaintiff subsequently constructed a duplex on the northern parcel, which fronts Haldane Avenue. In 1999, plaintiff applied for a building permit to construct a duplex on the southern parcel. His request was denied because that parcel did not have frontage on a public street that had been accepted for maintenance by the city, contrary to the city's zoning ordinance, § 40.10.01. Plaintiff subsequently commenced this action alleging that the city's zoning ordinance, as applied to his southern parcel, effects an unconstitutional taking of his property without just compensation. Plaintiff also brought a claim for equitable estoppel. The trial court granted the city's motion for summary disposition and dismissed both claims.<sup>1</sup>

Plaintiff first argues that the trial court erred in dismissing his claim that the city's zoning ordinance, as applied, effected an unconstitutional taking of his property. We disagree.

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<sup>1</sup> Plaintiff also alleged claims for breach of contract and acquiescence, which are not at issue on appeal.

A trial court's grant of summary disposition is reviewed de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion brought under MCR 2.116(C)(10), the trial court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996). If the nonmoving party fails to establish that a material fact is at issue, the motion is properly granted. *Id.* at 363.

Both the Fifth Amendment of the United States Constitution and the Michigan Constitution, Const 1963, art 10, § 2, provide that private property shall not be taken without just compensation. "The United States Supreme Court has recognized that the government may effectively 'take' a person's property by overburdening that property with regulations." *K & K Const, Inc v Dep't of Natural Resources*, 456 Mich 570, 576; 575 NW2d 531 (1998). "While all cases require a case-specific inquiry, courts have found that land use regulations effectuate a taking in two general situations: (1) where the regulation does not substantially advance a legitimate state interest, or (2) where the regulation denies an owner economically viable use of his land." *Id.* at 576.

Regarding the first type of taking, "zoning regulation has been upheld where it promotes the health, safety, morals, or general welfare even though the regulation may adversely affect recognized property interests." *Bevan v Brandon Twp*, 438 Mich 385, 390; 475 NW2d 37 (1991). A broad range of governmental purposes will satisfy this test, and the validity of an ordinance is presumed. *Id.* at 398.

"The second type of taking, where the regulation de[prives] an owner of economically viable use of land, is further subdivided into two situations: (a) a 'categorical' taking, where the owner is deprived of 'all economically beneficial or productive use of land,' *Lucas v South Carolina Coastal Council*, 505 US 1003, 1015; 112 S Ct 2886; 120 L Ed 2d 798 (1992); or (b) a taking recognized on the basis of the application of the traditional 'balancing test' established in *Penn Central Transportation Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978)." *K & K, supra* at 576-577.

"[A] mere diminution in property value that results from a regulation does not amount to a [categorical] taking." *Bevan, supra* at 402-403. Rather, to show a categorical taking, an owner must show that there has been a physical invasion of the property or that he has been forced to "sacrifice *all* economically beneficial uses [of his land] in the name of the common good." *K & K, supra* at 577, 586-587. By comparison, under the *Penn Central* balancing test, "the question whether a regulation denies the owner economically viable use of land requires at least a comparison of the value removed with the value that remains." *Bevan, supra* at 391; see also *K & K, supra* at 586-588. "The owner must show that the property is either unsuitable for use as zoned or unmarketable as zoned." *Bevan, supra* at 403. The balancing test requires a court to determine: "(1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations." *K & K, supra* at 577, 587-588.

In the present case, the city's zoning ordinance requires that residential dwellings be built only on public streets that have been accepted for maintenance by the city. Although the southern parcel fronts Canham Street, the city has not accepted Canham for maintenance because it is not wide enough to provide adequate drainage, whether by open ditches or storm sewers. Plaintiff alleges both types of regulatory taking, i.e., that the city's ordinance does not substantially advance a legitimate government interest, and that the regulation deprives him of economically viable use of his land.

Contrary to plaintiff's first argument, our Supreme Court has held that a regulation that requires roads to be of a certain width substantially advances a legitimate government interest in ensuring that emergency equipment has adequate access to residential dwellings. See *Bevan, supra* at 398-400. Here, apart from ensuring access for emergency equipment, the city has additionally shown that its ordinance is intended to ensure that streets have adequate drainage. Thus, although plaintiff presented evidence indicating that the city's fire department believed that it would have adequate access to the property if certain conditions were met, plaintiff failed to create a question of fact concerning the legitimacy of the city's concern with proper drainage, particularly in light of the 1993 discussion before the zoning board of appeals (ZBA) concerning the area's flooding problems. Thus, plaintiff cannot prevail under the first type of taking.

Concerning the second type of taking, plaintiff focuses his analysis on the landlocked southern parcel. However, our Supreme Court has clearly held that where a regulatory taking is alleged, the "nonsegmentation" principle applies. *K & K, supra* at 578. "This principle holds that when evaluating the effect of a regulation on a piece of property, the effect of the regulation must be viewed with respect to the parcel as a whole." *Id.*; see also *Bevan, supra* at 394-397. Courts "must examine the effect of the regulation on the entire parcel, not just the affected portion of that parcel." *K & K, supra* at 577-578. Thus, "contiguous lots under the same ownership are to be considered as a whole for purposes of judging the reasonableness of zoning ordinances, despite the owner's division of the property into separate, identifiable lots." *Bevan, supra* at 395; see also *K & K, supra* at 579-580.

A property owner is not permitted to divide his land in such a way that it cannot be built on in compliance with applicable zoning ordinances, and then claim that the regulation effects a taking of property without just compensation. See *Bevan, supra* at 395-397; see also *Korby v Redford Twp*, 348 Mich 193, 198; 82 NW2d 441 (1957) (involving numerous contiguous parcels that were platted by their original owner into lots that were smaller than the minimum lot size required by the zoning ordinance). "The test of reasonableness may not be distorted or thwarted by any such artificial device." *Bevan, supra* at 396, quoting *Korby, supra* at 198. "Whether Michigan law allows a property owner to divide his land into separate parcels is not controlling for purposes of a taking analysis." *Bevan, supra* at 397.

Plaintiff argues that he has been forced to sacrifice all use of his southern parcel. However, *Bevan* and *Korby* require that plaintiff's property be considered as a whole. "'Artificial device[s],' such as tax identification numbers and separate deeds – analogous to the plat lines in *Korby* – are not controlling in determining whether enforcement of the ordinance in this case would amount to a taking." *Bevan, supra* at 397.

Plaintiff has already built a duplex on the northern parcel. Although plaintiff's land might have been worth more with more dwellings, a categorical taking cannot be premised on "a showing of disparity in value between uses." *Id.* at 404-405, quoting *Kirk v Tyrone Twp*, 398 Mich 429, 444; 247 NW2d 848 (1976). Thus, as a matter of law, plaintiff has failed to show that the city's ordinance effects a categorical taking.

With regard to whether there has been a taking under the *Penn Central* balancing test, plaintiff failed to produce any evidence of the original or present value of the land. Therefore, no value comparison can be made. Although plaintiff produced evidence that his southern parcel is unusable as zoned, it is undisputed that the ZBA informed plaintiff in January 1993 that the property, as a whole, would support a duplex and a single-family dwelling, but not two duplexes. Plaintiff chose to divide the parcels and build a duplex, but did not build the single-family dwelling. Further, because of the manner in which plaintiff chose to divide the parcels, he left himself no frontage on Haldane Avenue for the southern parcel, knowing that such frontage was required in order to be granted a building permit.

Plaintiff's argument that the city granted his lot split in 1993 in violation of the Land Division Act, MCL 560.101 *et seq.*, was not raised below and, therefore, is not preserved. Therefore, plaintiff must establish a plain error affecting his substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). As noted by the city, the Land Division Act provides that "[a]pproval of a division is not a determination that the resulting parcels comply with other ordinances or regulations." MCL 560.109(6). Further, while MCL 560.109(1)(e) requires a finding that "[e]ach resulting parcel is accessible" as a condition of approval, that section was added by 1996 PA 591, § 1, effective March 31, 1997, approximately four years after plaintiff's division was approved. Thus, plaintiff has failed to show a plain error concerning the city's compliance with the Land Division Act.

In sum, while plaintiff has shown that his southern parcel is unusable as zoned, the conclusion is inescapable that plaintiff brought this problem on himself. Using the balancing test, plaintiff has failed to create a question of material fact concerning whether the city's ordinance requiring frontage on a public street, as applied, effects an unconstitutional taking of his property without just compensation.

Next, plaintiff argues that the trial court erred in dismissing his estoppel claim. We disagree.

"Equitable estoppel is not an independent cause of action, but instead a doctrine that may assist a party by precluding the opposing party from asserting or denying the existence of a particular fact." *Lakeside Oakland Dev, LC v H & J Beef Co*, 249 Mich App 517, 527; 644 NW2d 765 (2002), quoting *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999). "Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts." *Conagra, supra* at 140-141.

Plaintiff argues that the city is estopped from denying that Canham Street is a public road under the highway by user statute, MCL 221.20, which provides:

All highways regularly established in pursuance of existing laws, all roads that shall have been used as such for 10 years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used 8 years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act. All highways that are or that may become such by time and use, shall be 4 rods in width, and where they are situated on section or quarter section lines, such lines shall be the center of such roads, and the land belonging to such roads shall be 2 rods in width on each side of such lines.

“The highway-by-user statute treats property subject to it as impliedly dedicated to the state for public use.” *Villadsen v Mason Co Rd Comm*, 268 Mich App 287; \_\_\_ NW2d \_\_\_ (2005), slip op at 3; see also *City of Kentwood v Sommerdyke Estate*, 458 Mich 642, 652-653; 581 NW2d 670 (1998). “Establishing a public highway pursuant to the highway by user statute requires four elements: (1) a defined line, (2) that the road was used and worked on by public authorities, (3) public travel and use for ten consecutive years without interruption, and (4) open, notorious, and exclusive public use.” *Villadsen, supra*, slip op at 3. “If all four elements are established, MCL 221.20 raises a rebuttable presumption that the road is four rods, or sixty-six feet, wide.” *Id.* In this case, it is undisputed that Canham Street is only 25 feet wide.

“The public use element ‘requires evidence of use of the roadway claimed to be a highway by user by members of the general public, not merely by employees of a governmental entity, on a repeated basis for the requisite ten-year period.’” *Id.*, slip op at 7, quoting *Cimock v Conklin*, 233 Mich App 79, 87; 592 NW2d 401 (1998). “[I]t is sufficient if the road was traveled as much as the circumstances of the surrounding population and their business required.” *Villadsen, supra*, slip op at 7, quoting *Kalkaska Co Bd of Co Rd Comm’rs v Nolan*, 249 Mich App 399, 403; 643 NW2d 276 (2002). “However, the road must be used by members of the general public and not merely the friends and family of people living on the road.” *Villadsen, supra*, slip op at 7.

In this case, plaintiff testified that the location of Canham Street was moved by contractors in approximately 2000. The evidence submitted by plaintiff shows, at best, that the city occasionally maintained Canham Street during the winter. There is no evidence that Canham Street has ever been used by the general public, let alone exclusively and notoriously. Thus, plaintiff cannot meet any of the four conditions required to establish a highway by user.

Plaintiff argues that by placing a sign on the corner, locating Canham Street on city maps, and occasionally maintaining it during the winter, the city negligently induced him to believe that Canham Street was a public street, and that he relied and acted on that belief, to his detriment. It is undisputed, however, that plaintiff was told as early as 1993, *before* the lot division, that Canham Street was *not* a public street. Because plaintiff knew the truth, he could not have relied on the city’s alleged conduct in determining whether and how to divide his lots. His estoppel claim was properly dismissed.

Affirmed.

/s/ Pat M. Donofrio

/s/ Stephen L. Borrello

/s/ Alton T. Davis